

FILED
SUPREME COURT
STATE OF WASHINGTON
4/26/2019 11:23 AM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
5/6/2019
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 95813-1

**IN THE SUPREME COURT OF THE STATE OF
WASHINGTON**

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN
APARTMENTS, LLC, and EILEEN, LLC,
Respondents,

v.

CITY OF SEATTLE,
Appellant.

**BRIEF FOR THE NATIONAL APARTMENT ASSOCIATION AND
THE WASHINGTON MULTI-FAMILY HOUSING ASSOCIATION
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS URGING
AFFIRMANCE**

Kelly A. Mennemeier
WSBA # 51838
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101

John J. McDermott, Esq.
General Counsel
National Apartment Association
4300 Wilson Boulevard, Suite 800
Arlington, Virginia 22203
*Counsel for Amici Curiae
National Apartment Association
and Washington Multi-Family
Housing Association*

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. CORPORATE DISCLOSURE STATEMENTS OF AMICI CURIAE	1
III. STATEMENTS OF THE INTERESTS OF AMICI CURIAE.....	1
IV. ARGUMENT	2
A. The Seattle Housing Market	2
B. No Rental Housing Organization Endorsed the “First-in-Time” Legislation.....	5
C. The “Scholars and Other Researchers” Cited by the City are not Credible Examples of Support for “First-in-Time” Laws.....	6
D. The Ability to Choose Who Uses One’s Property is a Fundamental Aspect of Property Ownership.....	7
V. CONCLUSION.....	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Manufactured Housing Communities v. State</i> , 142 Wn. 2d 347 (2000).....	7
Rules	
Washington Evidence Rule 701.....	7
Other Authorities	
“Housing Justice,” Washington Community Action Network https://www.washingtoncan.org/housingjustice	7
Hoyt Advisory Services with Dinn Focused Marketing and Eigin10 Advisors, <i>Barriers to Apartment Construction Index</i> (2018).....	3
Urban Institute <i>et al.</i> , <i>Housing Discrimination Against Racial and Ethnic Minorities 2012</i> (June 2013).....	4
Robert McCartney, <i>Amazon in Seattle: Economic godsend or self-centered behemoth?</i> , THE WASHINGTON POST (April 8 2019).....	3

I. INTRODUCTION

Amici curiae, the National Apartment Association (hereinafter “NAA”) and the Washington Multi-Family Housing Association (hereinafter “WMFHA”), appreciate the Court’s permission to submit an amicus brief in this lawsuit. NAA and WMFHA urge the Court to affirm the judgment below and adopt, by reference, the arguments submitted by Respondents. We write separately to expose the deceptive nature of the City of Seattle’s arguments, which pretend to find support for the flawed “First-in-Time” law in statements made by industry trade groups and opinions from “scholars” with little or no experience in providing rental housing.

II. CORPORATE DISCLOSURE STATEMENTS OF AMICI CURIAE

Amici curiae, NAA and WMFHA, make the following disclosures:

(1) NAA and WMFHA are nonprofit trade associations which have no parent corporations; and (2) no publicly held company owns 10% or more of either Association’s stock.

III. STATEMENTS OF THE INTERESTS OF AMICI CURIAE

NAA is a trade association for owners and managers of rental housing. NAA is comprised of 150 state and local affiliated apartment associations. NAA encompasses over 81,000 members representing more than 9.6 million rental homes throughout the United States, Canada, and

the United Kingdom. NAA, which is the leading national advocate for quality rental housing, is also the largest trade organization dedicated solely to rental housing. As part of its business, NAA advocates for fair governmental treatment of rental housing businesses nationwide, including advocating the interests of the rental housing business community at large in legal cases of national concern.

WMFHA is the Washington State chapter of the National Apartment Association. WMFHA is a nonprofit trade association comprised of owners and managers of multifamily properties, apartment communities representing 225,000 rental homes, and industry suppliers. WMFHA promotes and advances the multifamily housing industry in Washington State to serve its members and those members' valued residents.

IV. ARGUMENT

A. The Seattle Housing Market

Seattle faces significant barriers to the expansion of its rental housing market. According to a national survey conducted in 2018 into the factors that constrain the supply of apartments, the Seattle metropolitan area “was ranked in the top fourth of major multifamily markets . . . while sustained demand [for apartments] remains in the top

third of national metros.”¹ Local survey respondents cited land availability and its feasibility as the top barrier to new apartment construction in Seattle, followed by construction costs.² Survey respondents also noted that “[a]pproval timelines are lengthy [for] land and project rezoning” and that “[c]ommunity involvement slows new development with strong local opposition and the public engagement required.”³ The Seattle City Council’s “First-in-Time” Ordinance will only add to the already significant barriers to rental housing supply that exist in Seattle.

Seattle City Council members have acknowledged the existence of a “housing crisis” in Seattle.⁴ However, the City Council’s approach to addressing the housing needs of Seattle citizens was legislation essentially telling renters to “form a line.” The “First-in-Time” Ordinance does

¹ Hoyt Advisory Services with Dinn Focused Marketing and Eigin10 Advisors, *Barriers to Apartment Construction Index*, 48 (2018), https://www.naahq.org/sites/default/files/naa-documents/naa_btac_index_summary_seattle.pdf.

² *Id.*

³ *Id.*

⁴ See, e.g., Robert McCartney, *Amazon in Seattle: Economic godsend or self-centered behemoth?*, THE WASHINGTON POST (April 8, 2019), https://www.washingtonpost.com/local/trafficandcommuting/amazon-in-seattle-economic-godsend-or-self-centered-behemoth/2019/04/08/7d29999a-4ce3-11e9-93d0-64dbcf38ba41_story.html?noredirect=on&utm_term=.93e769f2bd49 (quoting City Councilmember Kshama Sawant saying “There is a clear understanding that the political establishment has utterly failed to address the housing crisis”).

nothing to address the underlying barriers to building new housing in an overheated market. Instead, it creates an ineffective solution to a problem—housing discrimination—that is already declining.⁵

There is a fundamental misunderstanding that underlies this legislation: the belief that apartment owners and operators are in the business of “not renting” their inventory of rental homes to people. In fact, the opposite is true. Housing providers have every incentive to rent apartments to applicants.⁶ Vacant units produce no rent or cash flow and are simply an underutilized asset waiting to be occupied. Landlords thus decline to rent units only when justified by legitimate business concerns. The “First-in-Time” law elevates the timing of an application over all other valid business concerns, particularly the ability of the applicant to actually meet the contractual obligation to pay rent over the course of the lease term, to the detriment of rental housing providers.

Moreover, “First-in-Time” is an ineffective device to combat housing discrimination. The criteria for prospective tenants remain within

⁵ See Urban Institute *et al.*, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, xi (June 2013), *cited in* City’s Opening Brief, 6-7 (noting that “the most blatant forms of housing discrimination . . . have declined since the first national paired-testing study in 1977”).

⁶ This is true both for individuals and privately held companies, who use rental properties to generate income, and for rental housing providers that are publicly-traded companies, and which therefore owe duties to their shareholders to act in their best interests (i.e., by ensuring the rental properties generate revenue).

the landlord's discretion. If a landlord were to ignore the business imperatives described above, she would simply adopt and publish more stringent screening criteria with the effect of perpetuating housing discrimination while remaining, facially, within the confines of the law. The "First-in-Time" Ordinance thus fails to achieve its objective, while simultaneously placing undue restraints on rental housing providers. Such constraints risk further restricting the Seattle rental housing market by disincentivizing would-be landlords from entering into or building upon the rental housing market in Seattle.

B. No Rental Housing Organization Endorsed the "First-in-Time" Legislation

In a breathtaking exercise of sophistry, the City of Seattle argues that "Landlord organizations . . . recommend first-in-time" requirements. City's Opening Brief, 9-10. The City quotes portions of various websites, including that of WMFHA, to deliberately create the impression that the language should be construed as an endorsement of "First-in-Time." Such language is not an endorsement.

Trade associations like NAA and its affiliated state association, WMFHA, are member-based nonprofit corporations that undertake the responsibility of educating their members about their legal responsibilities (such as Fair Housing Act compliance) and advocating on their behalf

before government bodies. These groups have the obligation to inform their members about how they might comply with various housing laws—even bad ones. The website language cited in the City’s brief is simply compliance information distributed to members, nothing more.

The City’s brief notably lacks any reference to legislative history of the “landlord organizations” testifying in favor of “First-in-Time” legislation. There was no such record. Instead, the City relies on website content, which it cites in a misleading way that suggests the rental housing industry supported this legislation. It did not.

C. The “Scholars and Other Researchers” Cited by the City are not Credible Examples of Support for “First-in-Time” Laws

In addition to its misleading efforts to portray housing groups as supportive of “First-in-Time” laws, the City tries to bolster its position by citing “legal scholars and researchers” who also supposedly support “First-in-Time” laws. Yet the law review articles it cites (some over a decade old) do not expressly address or endorse “First-in-Time” laws. Moreover, there is no indication that the authors of the cited articles have any personal experience as rental housing providers. Nor have the authors been qualified as experts in rental housing issues.

Even less compelling are the articles published under the sponsorship of the Washington Community Action Network. *See* City’s

Brief, 7. This organization, under its “Housing Justice” project, suggests that rent itself is unjust and describes rental property as “the ultimate source of profit, status, and control in our society.”⁷ Citing the Washington Community Action Network as scholarly authority is misleading. Its communications are mere opinion; there is no evidence that statements from this organization are supported by any factual background or scientific underpinning that could assist the Court. Lay opinions, unlike facts, should not be entitled to serious consideration by the Court. *See* Wash. Evidence Rule 701.

D. The Ability to Choose Who Uses One’s Property is a Fundamental Aspect of Property Ownership

Manufactured Housing Communities v. State, which recognizes a number of rights and interests held by property owners in their property, remains controlling authority in Washington. 142 Wn. 2d 347, 365-67 (2000) (finding unconstitutional a statute giving tenants of a mobile home park a right of first refusal to purchase their homes in the event of sale by the owners). Property interests include the right to determine who may use, or be excluded from, one’s property.

⁷ “Housing Justice,” Washington Community Action Network, <https://www.washingtoncan.org/housingjustice> (last visited Apr. 15, 2019).

The trial court below properly recognized that the Yims want to—and are entitled to—make tenant selection decisions from a pool of qualified persons. The ability to choose who occupies one’s property is a fundamental aspect of property ownership, intimately related to the freedom to form contracts with whomever one chooses. The Seattle City Council should not be permitted to enact rules that impede property owners’ rights.

V. CONCLUSION

For the foregoing reasons, we respectfully urge the Court to affirm the judgment below.

Dated: April 26, 2019.

Respectfully Submitted,

s/ Kelly A. Mennemeier

Kelly A. Mennemeier, WSBA # 51838

FOSTER PEPPER PLLC

1111 Third Avenue, Suite 3000

Seattle, WA 98101

Telephone No.: (206) 447-4400

Facsimile No.: (206) 447-9700

Email: kelly.mennemeier@foster.com

and

s/ John J. McDermott

John J. McDermott, Esq.

General Counsel

National Apartment Association

4300 Wilson Boulevard, Suite 800

Arlington, Virginia 22203

Telephone No.: (703) 518-6141

Email: jmcdermott@naahq.org

*Counsel for Amici Curiae, National
Apartment Association and Washington
Multi-Family Housing Association*

CERTIFICATE OF SERVICE

I certify that on April 26, 2019, I caused to be electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED on April 26, 2019, at Seattle, Washington.

/s/ Kelly A. Mennemeier

Kelly A. Mennemeier, WSBA
#51838

FOSTER PEPPER PLLC

April 26, 2019 - 11:23 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95813-1
Appellate Court Case Title: Chong and Marilyn Yim, et al. v. The City of Seattle
Superior Court Case Number: 17-2-05595-6

The following documents have been uploaded:

- 958131_Briefs_20190426111959SC681709_9897.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was NAA Brief.pdf

A copy of the uploaded files will be sent to:

- bth@pacificlegal.org
- ewb@pacificlegal.org
- galexander@bgwp.net
- hannahatlaw@gmail.com
- hsells@freedomfoundation.com
- jacksonm@biaw.com
- jan@olsenlawfirm.com
- jmcdermott@naahq.org
- jwmaynard2003@yahoo.com
- kelly.mennemeier@foster.com
- lise.kim@seattle.gov
- litdocket@foster.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- roger.wynne@seattle.gov
- rory.osullivan@gmail.com
- roryo@uw.edu
- sandra.lonon@foster.com
- sara.oconnor-kriss@seattle.gov
- walt@olsenlawfirm.com

Comments:

Sender Name: Kelly Mennemeier - Email: kelly.mennemeier@foster.com
Address:
1111 3RD AVE STE 3000
SEATTLE, WA, 98101-3296
Phone: 206-447-4694

Note: The Filing Id is 20190426111959SC681709